BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JODY FERRER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,046
WAL-MART STORES, INC.	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the November 7, 2011 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on February 17, 2012, in Wichita, Kansas.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. Matthew R. Bergmann, of Topeka, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Members Gary R. Terrill and Thomas D. Arnhold, have recused themselves from this appeal. Accordingly, Jeffrey King, of Salina, Kansas and E.L. Lee Kinch, of Wichita, Kansas, have been appointed as Board Member Pro Tems in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, with the exception that, during oral argument to the Board the parties agreed that the appropriate date of accident for the series would be June 8, 2010, if the Board finds that claimant suffered a series of accidents.

ISSUES

The ALJ found the opinions of board certified orthopedic surgeon Pat D. Do the most persuasive and claimant's date of injury to be 2003, thereby finding claimant failed to sustain her burden of proving that she suffered any permanent aggravation of that condition from an injury occurring through June 8, 2010. The ALJ did not explain why no compensation was awarded for the 2003 injury.

The claimant requests review of whether the ALJ erred in concluding that she failed to sustain her burden of proof that she suffered personal injury by accident arising out of and in the course of employment at Wal-Mart through a series of accidents ending on June 8, 2010, the date claimant submitted written notice of the injury pursuant to K.S.A. 44-520. Claimant argues she proved that she suffered additional injuries to her back as the result of her ongoing employment with respondent. Therefore the ALJ's decision should be reversed and the matter remanded to the ALJ for a determination of the issues not yet determined.

Respondent contends that claimant did not meet with personal injury on March 29, 2010, or any amended date as alleged. Therefore, the ALJ 's finding that claimant failed in her burden of proving that she suffered any permanent aggravation for an injury date of June 8, 2010 should be affirmed.

FINDINGS OF FACT

Claimant began working for respondent on March 20, 2003 at its store in El Dorado, Kansas. She started as a cashier in the automotive department, then moved to a night stocker position and then to the electronics department for a year. After that claimant was promoted to a support manager position in the automotive department. She held that position for 8 months and was then transferred back to electronics. Claimant's duties were to assist customers, write work orders, stock shelves, change batteries and oil in vehicles, lift air compressors, and clean. Claimant testified that these jobs required fairly physical activity.

A few weeks after claimant began working for respondent she fell backwards off of a ladder while she was stocking shelves and landed on her back. Claimant estimated that this event took place on April 5, 2003. She was sent to the emergency room and met with respondent's workers compensation physician. X-rays displayed a spinal contusion. At that time the workers compensation physician was Cathy Cooper, out of the El Dorado Family Clinic. Dr. Cooper provided claimant with pain relieving medication and released her to return to work with weight restrictions. Claimant did not recall the specifics of the

restrictions or if they were permanent. She only knew that she wasn't allowed to lift anything heavy.[1] Claimant did not receive any additional medical treatment in 2003.

Claimant was sent back to work and continued to work with pain. Over a several year period, the pain gradually worsened. Claimant denied suffering any other accidents to her low back during her employment with respondent. She testified that when she experienced pain it mostly occurred at work while she was performing heavy lifting. She admitted that there were days when she would move items and not experience back pain.

In March 2009, claimant awoke with pain so bad that she couldn't get out of bed and had to be carried to the restroom. Claimant's pain was usually off and on, but that morning in March, when she woke up, the pain was the worst she had ever experienced in her life.[2] Claimant testified that she had been reporting her pain to respondent and she was given extra work breaks as she needed them. Claimant made an appointment with Dr. Do.

Claimant first met with Dr. Pat Do, a board certified orthopedic surgeon on February 24, 2009, for treatment for her back pain. When claimant met with Dr. Do she told him about her fall in 2003 and reported that she did not consider it work-related because she hadn't filled out an accident report and hadn't made a claim. She told him that her back had gotten worse since her prior injury because of the type of work she did for respondent. Claimant testified that Dr. Do then told her that her pain might be work-related, but he couldn't be sure because he didn't have all of the facts. It wasn't until claimant inquired that she learned that she didn't need an accident report to file a claim. She then went to the personnel office and talked with Kathy Ingram, respondent's personnel manager, to report her back pain. She didn't specify that it was because of her 2003 fall. After her meeting with personnel, claimant contacted an attorney and filed a claim, indicating a new injury. She continued treating with Dr. Do for her back pain. She was sent for physical therapy and received epidural injections.

Claimant was referred to Dr. Whitaker, a surgeon. Dr. Whitaker ordered an MRI which revealed degenerated discs, which was surprising for someone claimant's age. In December 2009, claimant had a procedure to determine which discs were causing her pain and then in April 2010, she had surgery at L5-S1.[3] Claimant continued under Dr. Whitaker's care and continued to go to physical therapy twice a week. Claimant's last day of work for respondent was April 6, 2010, two days before she underwent back surgery. After surgery, which involved a foraminal decompression and anterior lumbar fusion at L5-S1, with instrumentation and an allograft for spinal fusion, claimant was again referred to physical therapy. After physical therapy, claimant was released to return to work with

---

[1] Claimant's Discovery Depo. at 12-13.

[2] R.H. Trans. at 31.

[3] Claimant's Discovery Depo. at 20-21.

restrictions. However, she did not return to work after surgery. Claimant filed for FMLA on April 7, 2010 for the period from April 8, 2010 to June 3, 2010. Her employment with respondent was officially terminated on December 3, 2010.

Her final appointment with Dr. Whitaker was at the end of August 2010. She was supposed to have one more visit in October, but it didn't happen because her insurance was cancelled and she didn't have the money to pay for the visit. Claimant was contacted after her surgery by Melinda requesting that she come in and file an accident report.

Claimant testified that her back is doing a lot better since the surgery. She doesn't have severe pain any more, but continues to have discomfort and pins and needles in her left leg.[4] She also testified that bending, any kind of kneeling or extending makes her pain worse.

Claimant reported a work-related incident while working for respondent in 2004 when she injured her shoulder. She filled out the necessary paperwork and received medical treatment. She also had an incident in 2005 where she was crushed between two counters. She went to the emergency room, but did not fill out an accident report because the personnel office was not open at the time of the incident.

Claimant testified that since 2003 when she fell off the ladder, she has had sporadic pain in her back. The pain is severe and lasts about five minutes and then it goes away.[5] She testified the heavier the work the more pain she had.

Claimant spoke with Kathy Ankrum, Kerri Kelly and Robert Thomas about her back injury and that it was related to her work for respondent. She also testified that the tire manager Jeff Livingtston was present one day in 2005 when she had a back spasm so bad she started to cry. Claimant missed work for her back probably once every three to four months for a couple of a days each time.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro Murati, M.D., for an examination on August 11, 2010. Claimant's complaints at the time were occasional low back pain, little twinges of pain radiating from the low back to the thighs and the inability to stand or sit for long periods of time.

Dr. Murati examined claimant and her prior medical records and opined that she was status post L5-S1 radical diskectomy to the level of the posterior longitudinal ligament including the lateral recess and foraminal decompression, L5-S1 intevertebral devices, L5-

---

[4] R.H. Trans. at 23.

[5] Claimant's Discovery Depo. at 31.

S1 anterior lumbar interbody fusion, L5-S1 anterior lumbar instrumentation, and allograft for spinal fusion.[6] Dr. Murati opined that the back surgery claimant had was necessitated by the combination of her fall and her continuing to lift heavy objects on a consistent basis.[7] He opined that the main reason to fuse a back is because of instability. He testified that there was no history of sciatic injury in 2003 and no evidence during physical examination of a 2003 injury.

Dr. Murati went on to opine that this diagnosis was within reasonable medical probability a direct result of the work-related injuries that occurred due to claimant's repetitive work activities while employed at Wal-Mart. He found claimant to be at maximum medical improvement and assigned temporary restrictions of no crawling, no lifting, carrying, pushing or pulling of more than 20 pounds, occasionally and 10 pounds frequently. Claimant was to rarely bend, crouch or stoop, occasionally sit, climb stairs, climb ladders, squat or kneel, frequently stand or walk and alternate sitting, standing and walking.[8] These restrictions were imposed to aid claimant in avoiding further injury.

On September 7, 2010, Dr. Murati issued an impairment rating of 20 percent to the whole person based on Lumbosacral DRE Category IV of the 4th edition of the AMA *Guides*.[9] He also made claimant's restrictions permanent.

Dr. Murati reviewed the task list provided by Robert Barrett and opined that the claimant could no longer perform 15 out of 16 tasks for a 93.75 percent task loss.

Claimant again met with Dr. Do on April 20, 2011 for an evaluation, at the request of respondent. Dr. Do opined that claimant was at maximum medical improvement, assigned a 20 percent whole person impairment and placed restrictions limiting bending past 90 degrees with the upper back 33 percent of the day, restricted lifting greater than 50 pounds, allowed occasional lifting from 20 to 50 pounds and constant lifting from 0 to 20 pounds.[10]

Dr. Do was not initially asked to address causation as part of this examination. He was later asked for his opinion on causation, which he provided on June 1, 2011. Dr. Do opined that claimant's date of injury is probably 2003 because she has had pain since that injury. He testified that repetitive activities will cause pain and anything you do in life can

---

[6] Murati Depo., Ex. 2 at 3 (Murati's Aug. 11, 2010 IME report).

[7] *Id.* at 12.

[8] *Id.*, Ex. 2 at 4 (Release to Return to Work form Aug. 11, 2010).

[9] *Id.*, Ex. 3 (Murati's Sept. 7, 2010 report).

[10] Do Depo. at 8.

cause a temporary aggravation of the type of injury she suffered in 2003. Dr. Do agreed that it wouldn't be inconceivable that the work activities of lifting crates of oil and tires and TVs on a regular basis could cause a permanent aggravation. But he couldn't say with any medical certainty that the activity caused claimant a permanent aggravation. He acknowledged that claimant did not require surgery until after he examined her in February 2009.

Claimant met with Robert Barnett, Ph.D., via telephone on January 7, 2011 for a vocational assessment. Claimant was not working at the time of this visit and therefore had a 100 percent wage loss. Claimant is able to drive for up to one hour and can walk for 30 minutes without difficulty. Claimant can perform, with some difficulty, self-care.

Dr. Barnett felt that based on Dr. Murati's work restrictions claimant has a 94 percent task loss and when combined with the 100 percent wage loss, a 97 percent work disability. Dr. Barnett did not do any kind of independent investigation into the job tasks that claimant gave him and he didn't obtain any job descriptions from respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[11]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[12]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[13]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his

[11] K.S.A. 44-501 and K.S.A. 44-508(g).

[12] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[13] K.S.A. 44-501(a).

> employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[14]

The ALJ, in the Award, found that claimant's ongoing problems stemmed from the work-related accident in 2003. He went on to find that claimant had failed to prove permanent aggravation from the June 8, 2010 accident. The Board, after reviewing the medical testimony of both Dr. Do and Dr. Murati, disagrees with that finding. Claimant worked for several years performing heavy lifting, bending and stooping on a regular basis. She reported ongoing pain complaints to her supervisors on many occasions. She even suffered pain to the point of crying at work. Dr. Murati determined that, within a reasonable degree of medical certainty, claimant had suffered increased pain and injury during her several years of heavy work for respondent. He noted the need for surgery did not occur after the 2003 accident. The surgery became necessary after the labors leading to the hospitalization in 2009

Dr. Do related the entire problem to the 2003 accident. However, when asked, he agreed that it is not inconceivable that the ongoing work activities, including the lifting of crates of oil, tires and TVs on a regular basis could cause permanent aggravation of her earlier physical problems. He was unable to say with any medical certainty that the work activity did cause permanent aggravation. But, his opinion is not specific regarding the cause of claimant's physical problems in 2009 and the resulting need for surgery. The causation opinion of Dr. Murati in this instance is more persuasive than that of Dr. Do. Dr. Murati's opinion is consistent with claimant's testimony concerning the progression of her condition. The Board finds that claimant suffered a series of micro trauma's from the heavy lifting at work. The need for the surgery stems from those activities over several years, rather than from the incident in 2003. The denial of benefits by the ALJ is reversed. This matter is remanded to the ALJ for a determination of the remaining issues still before the court.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered personal injury by a series of accidents while employed with respondent through 2009, leading to the need for surgery to her low back. Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

---

[14] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated November 7, 2011, is reversed and the matter remanded to the ALJ for further proceedings and/or orders consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge